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ILLINOIS COMMERCE COMMISSION :

On Its Own Motion, :

-vs- :

Central Illinois Light Company, et al., :

Respondents, :

Docket No. 00-0494

Proceeding On the Commission's Own :
Motion Concerning Delivery Services :
Tariffs Of All Illinois Electric Utilities To :
Determine What If Any Changes Should Be :
Ordered To Promote Statewide Uniformity :
Of Delivery Services and Related Tariffed :
Offerings. :

**REPLY BRIEF ON EXCEPTIONS OF
COMMONWEALTH EDISON COMPANY**

Paul F. Hanzlik
John P. Ratnaswamy
Cynthia A. Fonner
FOLEY & LARDNER
Three First National Plaza
70 W. Madison St.
Suite 4100
Chicago, Illinois 60602
(312) 558-6600

Rebecca J. Lauer
Vice President and General Counsel
COMMONWEALTH EDISON COMPANY
One Financial Place
440 S. LaSalle St.
Suite 3300
Chicago, Illinois 60605

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**STATE OF ILLINOIS
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**REPLY BRIEF ON EXCEPTIONS OF
COMMONWEALTH EDISON COMPANY**

Commonwealth Edison Company ("ComEd"), through its counsel, pursuant to 83 Ill. Admin. Code § 200.830 and the Hearing Examiner's order, hereby submits its Reply Brief on Exceptions to the Hearing Examiner's Proposed Order (the "HEPO").

INTRODUCTION

As ComEd stated in its Brief on Exceptions, the law and the evidence in the record compel the conclusion that the Illinois Commerce Commission (the "Commission") should continue to take a reasoned approach to achieving greater uniformity of delivery services business processes and tariffs -- *i.e.*, an approach that provides for greater uniformity where it is shown to be consistent with the law and where it makes sense considering both the benefits and the costs. (Brief on Exceptions of [ComEd] ["ComEd Br. Exc."], p. 1).

Based on the law and the evidence in the record, and application of the principle of a reasoned approach to the subject of uniformity, the Commission should make the following determinations as to the other parties' exceptions to the HEPO's recommendations on that subject:

- The HEPO should be clarified regarding the schedule for implementing uniform outlines for customer and supplier delivery services tariffs.¹ AmerenCIPS and AmerenUE ("Ameren") correctly have identified the need for such clarification. ComEd and, presumably, the remaining utilities other than Ameren should file proposed delivery services tariffs that incorporate the uniform outlines when they file their respective residential delivery services rate cases, which are anticipated to be filed on June 1, 2001. Amcren may be in a different position because it already has filed its rate case.
- The HEPO correctly provides for workshops to develop common definitions for customer and supplier delivery services tariffs. The Commission's Staff's ("Staff") proposal for additional workshops relating to development of uniform business practices and implementation plans also should be adopted, with certain limited modifications designed to reduce the duration, and the burden on the parties, of the workshops. Staff's proposal sensibly identifies areas in which further work towards greater uniformity is appropriate and is likely to lead to benefits that outweigh costs. Staff's new proposal for a somewhat related special Staff report that would occur during the pendency of the rate cases is inappropriate.
- The HEPO correctly rejects the proposals made by just three of the 21 parties to this Docket for a follow-on Docket, to be initiated on the heels of this Docket, to develop *pro forma* delivery services tariffs. While MidAmerican Energy Company ("MidAmerican") continues to propose such a Docket, MidAmerican's proposal remains unlawful, unwarranted, unwise, and ill-timed. NewEnergy Midwest, L.L.C. ("NewEnergy"), and the Illinois Industrial Energy Consumers ("the IIEC") now are offering a new variation on their prior support for MidAmerican's proposal, but NewEnergy's and the IIEC's new proposal likewise is illegal, unjustified, imprudent, and ill-timed.

The incontrovertible facts simply do not permit MidAmerican, NewEnergy, and the IIEC to continue to maintain the pretense that ComEd and the other utilities have not worked towards greater uniformity in relation to delivery services where uniformity makes sense. The results of

prior Commission Dockets such as Docket Nos. 98-0454, 98-0650, 98-0680, and the utilities' 1999 nonresidential delivery services rate case Dockets disprove that pretense. The results of this Docket also speak volumes. ComEd and the other utilities entered into the extensive Stipulation approved by the Commission's October 18, 2000, Interim Order in this Docket. Not only that, but, in the litigation phase of this Docket, ComEd proposed or agreed to Staff proposals providing for uniform outlines for customer and supplier delivery services tariffs, placing tables of contents at the front of these tariffs, placing definitions at the beginning of these tariffs, and conducting further workshops to develop common definitions for these tariffs. On top of that, as indicated above, ComEd is supporting Staff's proposal for additional workshops relating to development of uniform business practices and implementation plans, and ComEd is proposing refinements to Staff's proposal that are designed to reduce the duration, and the burden on the parties, of the workshops. ComEd plainly has worked steadfastly for greater uniformity where uniformity makes sense, and no party's innuendo can change that fact.

The HEPO itself expressly recognizes the many significant accomplishments that have been made in promoting useful uniformity as a result of the combined efforts of ComEd and the other utilities, RESSs, customers, and Staff in prior Dockets and in this Docket. (HEPO, p. 8). Staff also acknowledges that "great progress has been made towards uniformity through the use of Staff-sponsored workshops." (Brief on Exceptions of [Staff] ["Staff Br. Exc."], p. 2). Even MidAmerican, NewEnergy, and the IIEC acknowledge that there is a high degree of uniformity of business practices and many substantively uniform terms and conditions. (NewEnergy/IIEC Init. Br., pp. 23-24, 26-27). The notion that the Commission, on the heels of this Docket, should

¹ ComEd uses the term "supplier delivery services tariffs" here for convenience. In general, a utility provides delivery services to customers, not to Retail Electric Suppliers ("RESS").

initiate a follow-on Docket to establish uniform or *pro forma* tariffs because of ComEd's supposed intransigence is a dog that will not hunt.

In addition, the evidence in the record shows that the costs and burdens of such a follow-on Docket, on the heels of the instant Docket, would vastly exceed any benefits. The follow-on Docket would be tantamount to a consolidated State-wide delivery services rate case in which every line of the utilities' tariffs would be the subject of litigation, all to take place at the same time as the "workshopping" and litigation of the utilities' respective residential delivery services rate cases. As ComEd witness Arlene Juracek stated:

For a Hearing Examiner to try to conduct such a State-wide Docket would be like trying to herd cats while riding a unicycle on a gravel road in a thunderstorm.

(Juracek Sur., ComEd Ex. 6.0, p. 10).

The monumental effort that would be required of all parties by such a follow-on Docket stands in stark contrast with the absence of any evidence in the record that, as a result of any lack of greater uniformity of delivery services tariffs, any prospective RES has failed to enter Illinois or any service territory in Illinois, even one customer has failed to switch to delivery services, or even one dollar of additional costs supposedly has been incurred by any RES or by any customer. The bottom line is this: no party did or could submit evidence explaining how the remaining differences between utilities supposedly reduce competition. What the evidence in the record does show, among other things, is that at this stage of the development of the market it makes no sense to leap to uniform or *pro forma* tariffs, and that to do so would discourage innovation. MidAmerican's, NewEnergy's, and the IIEC's pleas and arguments for such a follow-on Docket are "all hat and no cattle". As Peoples Energy Services Corporation, a RES operating in ComEd's service territory noted, "[t]here are more useful issues and areas for PE

Services to devote its limited resources in order to continue to develop customer choice.” (Peoples Init. Br., p. 3).

One final point should be made here: No party now is even challenging any provision whatsoever of ComEd’s tariffs in this Docket other than ComEd’s approach to payment posting and billing under the single billing option (the “SBO”). Under the circumstances, the notion that the Commission should initiate another Docket, on the heels of this Docket, to review ComEd’s tariffs from top to bottom, is palpably absurd.

ComEd generally supports Ameren’s and the Central Illinois Light Company’s (“CILCO”) exceptions to the HEPO’s recommendations of changes in payment posting and billing under the SBO. Their exceptions follow from the law and the evidence in the record. In contrast, MidAmerican’s, NewEnergy’s, and the IIEC’s inconsistent exceptions on that subject are not well-taken. ComEd, in the alternative, requests that the HEPO be clarified regarding the schedule for implementing changes in payment posting and billing under the SBO and regarding cost recovery.

ComEd, in accordance with 83 Ill. Admin. Code § 200.830, is submitting appropriate proposed language for its requested revisions to the HEPO.

REPLIES ON EXCEPTIONS

I.

The HEPO Should Be Clarified Regarding The Schedule For Implementing Uniform Outlines For Customer and Supplier Delivery Services Tariffs

ComEd’s Brief on Exceptions showed why ComEd’s proposed uniform outlines for customer and supplier delivery services tariffs should be adopted. (ComEd. Br. Exc., pp. 22-26). ComEd’ proposed uniform outlines are fully supported by the evidence in the record and by

several other parties, while Staff's proposed revised uniform outlines were first proposed in post-hearing briefing and are not supported by any evidence in the record. (*Id.*)

Ameren correctly notes that the HEPO does not expressly address the date by which the utilities must incorporate the uniform outlines in their tariffs. (Brief on Exception of [Ameren] ["Ameren Br. Exc."], pp. 1-2). Ameren also correctly points out that it already has filed its residential delivery services rate case, while ComEd and the remaining utilities other than Ameren anticipate filing their rate cases on June 1, 2001. (*Id.* at p. 2).

ComEd's conclusion is that it would be most efficient and practical if ComEd, and, presumably, the remaining utilities other than Ameren were to file proposed delivery services tariffs that incorporate the uniform outlines when they file their respective residential delivery services rate cases. Filing proposed reorganized tariffs before then would be very problematic, because ComEd and the remaining utilities other than Ameren still are in the process of preparing their proposed residential delivery services tariffs. Also, as to ComEd and the remaining utilities other than Ameren, filing what necessarily would be tentative (placeholder) proposed reorganized tariffs sometime before June 1, 2001, which then would be subject to suspension, 220 ILCS 5/9-201, would seem to make little sense when they expect to file their actual proposed tariffs on June 1, 2001. ComEd takes no position on what should be the schedule as to Ameren.

ComEd accordingly requests that the HEPO's Findings and Orderings paragraphs, on page 17, be modified as follows, as shown in legislative style:

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that the utilities be and are hereby directed to adopt in their proposed tariffs to be filed in their residential delivery services rate cases the revisedproposed customer tariff outline and revisedproposed supplier tariff outline set forth in ComEd Exhibits 4.1 and 4.2 , attached to the Rebuttal testimony of ComEd witness Lawrence S. Alongi. Appendix A.

That proposed replacement language would need to be modified or supplemented to reflect the Commission's determination regarding the schedule for Ameren.

II.

The HEPO Correctly Provides For Workshops To Develop Common Definitions For Customer And Supplier Delivery Services Tariffs, And Should Be Modified To Provide For Additional Workshops Relating To Uniform Business Processes And Uniform Implementation Plans

The HEPO correctly provides for workshops to develop common definitions for customer and supplier delivery services tariffs. (HEPO, pp. 9, 18). Staff's proposal for additional workshops relating to development of uniform business practices and implementation plans (Staff Br. Exc., p. 1) also should be adopted, with certain limited modifications designed to reduce the duration, and the burden on the parties, of the workshops. Staff's proposal sensibly identifies areas in which further work towards greater uniformity is appropriate and is likely to lead to benefits that outweigh costs. Staff's proposal for a somewhat related special Staff report is inappropriate.

A. The HEPO Correctly Provides For Workshops To Develop Common Definitions For Customer And Supplier Delivery Services Tariffs

The HEPO correctly provides for workshops to develop common definitions for customer and supplier delivery services tariffs. (HEPO, pp. 9, 18). Staff witness Dr. Eric Schlaf, in his direct testimony, stated in part: "[R]egarding the definitions themselves, it is difficult to understand why each utility should use different definitions to describe the same terms. Staff would be open to meeting with the parties to discuss common definitions." (Schlaf Direct ["Dir."], Staff Ex. 1, pp. 10-11). ComEd witness Lawrence Alongi, in his rebuttal testimony,

stated that ComEd recognized that certain terms have a common meaning across the utilities' delivery services tariffs and stated that ComEd also would be "willing to meet with Staff and other interested parties to develop uniform definitions for such terms to be contained in customer and supplier delivery services tariffs, and terms of general application to be incorporated into the existing Definitions section of ComEd's Terms and Conditions." (Alongi Rebuttal ["Reb."], ComEd Ex. 4.0, pp. 8-9). Based on that and other evidence in the record, the HEPO was well advised to provide for such workshops.

As is discussed in the next subsection of this Reply, Staff now "interprets the HEPO as recommending that an additional purpose of the workshops would be to develop uniform business practices and uniform delivery services implementation plans". (Staff Br. Exc., p. 1). ComEd does not share Staff's interpretation of the HEPO on that point. However, as is discussed below, ComEd nonetheless can support Staff's proposal for additional workshops on those subjects, with certain limited modifications designed to reduce the duration, and the burden on the parties, of the workshops. As also is discussed below, while Staff's proposal appears to contemplate that all of the workshops would be combined (Staff Br., Exc., pp. 4-5), ComEd believes that it is important for all parties that the workshops on common definitions should be conducted separately from the workshops on developing uniform business processes and implementation plans, and ComEd therefore requests a modification of Staff's proposal on that specific point.

Finally, Staff appears to interpret the HEPO's use of the term "uniform language" in the HEPO's provision for "workshops to develop common definitions and uniform language" (HEPO, p. 9) more expansively than does ComEd. (Staff Br. Exc., pp. 1-5). ComEd believes that, in light of the origins of that provision of the HEPO, and in context, the term "uniform

language” should be understood to mean uniform language for or associated with the common definitions. What will derail those workshops is if one or more parties reads the HEPO’s provision for “workshops to develop common definitions and uniform language” to be license for wholesale redrafting of most or all provisions of utilities’ tariffs from top to bottom and line by line. That reading would make the HEPO’s provision for workshops on “common definitions” entirely superfluous (redundant), which is inappropriate. Even more importantly, that reading would hinder the central purpose of the workshops and would be inappropriate, unjustified, and a poor use of every party’s time, as is indicated further in the next subsection and in Section III of this Reply.

**B. Staff’s Proposal For Additional Workshops
Relating To Uniform Business Processes
And Implementation Plans Should Be
Adopted, With Certain Limited Modifications**

As is noted above, Staff now “interprets the HEPO as recommending that an additional purpose of the workshops would be to develop uniform business practices and uniform delivery services implementation plans”. (Staff Br. Exc., p. 1). As is stated above, ComEd does not share Staff’s interpretation of the HEPO on that point. Thus, ComEd believes that Staff’s “interpretation” of the HEPO is and should be treated as a proposal in its own right.

Staff’s proposal for additional workshops to develop uniform business processes and implementation plans should be adopted. The evidence in the record, such as evidence regarding the national Uniform Business Practices (“UBP”) effort, makes clear that the vast majority of market participants believe that it is uniform business processes, not uniform tariff language, that should be the focus of efforts towards greater uniformity. (E.g., Clair Dir., ComEd Ex. 1.0, p. 2 (discussing views of participants in the national UBP effort); Clair Sur., ComEd Ex. 7.0, p. 2 (same)). UBP participants were aware of, and unconcerned with, the fact that tariff provisions

differ from State to State and from utility to utility within States. (Clair Dir., ComEd Ex. 1.0, p. 2). They recognized that establishing common business practices, not more uniform tariffs, is the key to permitting suppliers to do business in different service territories and across State lines. (*Id.*; Clair Sur., ComEd Ex. 7.0, p. 2). Consequently, the UBP participants dedicated their efforts in that process exclusively to the development of more uniform business practices. (Clair Dir., ComEd Ex. 1.0, p. 2).

As is noted above, Staff 's proposal appears to contemplate that all of the workshops would be combined. (Staff Br. Exc., pp. 1-5). ComEd believes that that would be counter-productive. ComEd believes that, in order for each of the workshops to be efficient and effective, it is important that there be two separate workshop tracks.

The first track -- involving common definitions -- essentially involves reviewing and reconciling existing tariff language that relates to existing business processes, and should be quite straightforward, involving few, if any, policy questions. Indeed, ComEd anticipates that the workshops relating to common definitions likely will involve little, if any, significant controversy, although ComEd stresses that it is imperative that tariff language be complete, accurate, and precise and that the common definitions therefore must be carefully formulated. (*E.g.*, Alongi Dir., ComEd Ex. 2.0, pp. 2-7; Alongi Sur., ComEd Ex. 8.0, pp. 4-5). Keeping that track separately will not just ease the burden on all parties, it will have a critical implementation benefit. If the workshops relating to common definitions are conducted on a "stand-alone" basis, and the parties work cooperatively and constructively, then the workshops may be completed sufficiently in advance of June 1, 2001, that their results can be incorporated in the utilities' proposed tariffs anticipated to be filed on June 1, 2001. Even NewEnergy and the IIEC state that

the implementation of common definitions should not be delayed. (New/Energy/IEEC Init. Br., p. 4).

In contrast, the second track -- involving uniform business processes and implementation plans -- involves existing nonresidential open access implementation plans and non-existent residential open access implementation plans that only now are being developed, involves existing business processes and potential alternative or additional business processes that only now are being considered or developed, and may involve substantial policy questions. ComEd anticipates that those workshops may involve significant controversy on some subjects, e.g., the role(s) of customer agents. ComEd anticipates that it will be difficult to conclude those workshops prior to June 1, 2001, even if all parties work diligently and in good faith. Staff appears to share that view. (Staff Br. Exc., pp. 1-5). ComEd, therefore, does not believe that it would be prudent at this time for the Commission to set a date certain for conclusion of the workshops relating to uniform business processes and implementation plans.

Two additional considerations in favor of conducting two separate tracks of workshops. First, some non-utility parties may be interested only in one or the other of the two tracks. Second, parties may wish to be represented by different individuals in each of the two tracks. If the workshops are combined, then non-utility parties may feel that they effectively have no choice but to attend all of the workshops. However, as indicated earlier, it appears that most, if not all, market participants are more interested in uniform businesses processes than in uniform tariff language. (Clair Dir., ComEd Ex. 1.0, p. 2; Clair Sur., ComEd Ex. 7.0, p. 2). Giving non-utility parties a choice about which workshops to attend is in their interest. Also, it appears likely that utilities' rate department personnel would be more likely to participate in workshops relating to common definitions, while utilities' relevant operational department personnel would

be more likely to participate in workshops relating to uniform business processes and implementation plans. RESs may or may not be in an analogous position, i.e., they, too, may wish to send different personnel depending on the subject. The same may well be true of Staff.

Finally, Staff proposes that the workshops begin shortly, i.e., within 30 days after the entry of the Commission's Order in this Docket. (Staff Br. Exc., pp. 2, 4-5). ComEd is amenable to beginning the workshops that soon. In fact, ComEd would urge that the parties commence workshops, or at least informal discussions, regarding common definitions as soon as is practicable after entry of the Commission's Order.

ComEd accordingly recommends that, on page 9 of the HEPO, the following language be included immediately before the final sentence: "Staff also is instructed to conduct workshops to develop further uniformity in business processes and implementation plans. The former and the latter workshops should be separately conducted."

**C. Staff's Proposal For A Special
Staff Report Is Inappropriate**

Staff proposes for the first time in its Brief on Exceptions that Staff should be directed to file a special report with the Commission regarding: (i) the progress of the workshops, (ii) whether the Commission should initiate a new evidentiary proceeding (apparently a new Docket) to develop *pro forma* tariffs in lieu of further workshops, (iii) whether such a proceeding if held at the same time as the utilities' residential delivery services rate case would unduly impact those cases, (iv) whether the utilities' residential delivery services rate cases should be consolidated, and (v) whether the utilities' residential delivery services rate cases should be bifurcated into a first phase involving "rate matters" and a second phase involving "the development of uniform language". (Staff Br. Exc., pp. 2-5). Staff apparently anticipates that it would submit the special Staff report sometime after June 1, 2001, and before June 30, 2001. (*Id.* at pp. 2-3, 5).

Staff's proposal that it report to the Commission regarding a possible new Docket and regarding possible issues of consolidation and bifurcation of the utilities' residential delivery services rate cases is entirely unjustified and inappropriate. Staff will be a party to all of the utilities' residential delivery services rate cases. Staff, like any other party, within the constraints of the law and the facts, will be free to move for consolidation or bifurcation. 83 Ill. Admin Code Part 200. However, Staff's proposed report on those subjects, no matter how characterized, would appear to be nothing other than an improper *ex parte* communication. (220 ILCS 5/10-103, 83 Ill. Admin. Code 200.710, 5 ILCS 100/10-60). Whether Staff ultimately supports or opposes consolidation, that position should be stated in filings in the relevant Dockets. Anything else is manifestly improper and unfair to the other parties.

Not only that, but if the Commission were to take any action regarding consolidation or bifurcation, or as to any other aspect of the conduct of the utilities' residential delivery services rate cases, on the basis of the Staff report, without affording ComEd and the other utilities notice and a meaningful opportunity to be heard, then the Commission would have violated ComEd's and the other utilities' rights to due process. A Commission order that results from a violation of procedural rights or law is reversible error. 220 ILCS 5/10-201(e)(iv). *Citizens Util. Bd. v. Illinois Commerce Comm'n*, 166 Ill.2d 111, 120-21, 651 N.E.2d 1089, 1094-95 (1995). There is absolutely no reason for the Commission to authorize Staff to file a special report, during the pendency of filed Dockets, that threatens to compromise the utilities' rights and the legal sustainability of the Commission's decision-making.

ComEd further submits that Staff should not even be raising the possibility of consolidation of the utilities' residential delivery services rate cases, because consolidation would be illegal, unjustified, and counter-productive. When the possibility of consolidation was

raised in connection with the utilities' 1999 nonresidential delivery services rate cases, ComEd and a number of other parties opposed consolidation on those grounds. The Commission did not order consolidation. The same would be true this year -- consolidation would be disastrous. (*E.g.*, Alongi Reb., ComEd Ex. 4.0, p. 22).

ComEd submits that Staff also should not even be raising the possibility of bifurcation of the utilities' residential delivery services rate cases. Doing so would be unjustified and, in fact, essentially impossible. A utility's charges are necessarily tied to the business processes that are reflected in the terms and conditions of its tariffs. (Alongi Reb., ComEd Ex. 4.0, p. 18; Juracek Sur., ComEd Ex. 6.0, pp. 26-28). Changing terms and conditions may alter those business processes, which will affect the utility's revenue requirement and its rates. (Juracek Sur., ComEd Ex. 6.0, pp. 26-28). Tariffs and rates simply cannot be separated as Staff is suggesting. (*Id.*) Doing so will produce an unsustainable rate order. For each of the above reasons, the Commission should reject Staff's proposal for a special Staff report.

Finally, Staff's proposal that it report to the Commission regarding the progress of the workshops, even standing alone, is problematic. The workshops will be conducted pursuant to the Commission's Order in this Docket, will be related to Ameren's pending residential delivery services rate case, and will be related to the other utilities' rate cases. The subject matter will include matters that will be in litigation in those Dockets. Thus, Staff would have to be mindful both of the rules governing *ex parte* communications with the Commission, (220 ILCS 5/10-103, 83 Ill. Admin. Code 200.710, 5 ILCS 100/10-60), and of the principle that workshop discussions are confidential settlement discussions. As a practical matter, a useful Staff report could not avoid transgressing those restrictions. Of course, as discussed earlier, ComEd anticipates that the

workshops for development of common definitions could be completed before ComEd and the remaining utilities other than Ameren file their residential delivery services rate cases.

III.

The HEPO Correctly Rejects Proposals For A Follow-On Docket To Develop *Pro Forma* Tariffs

The HEPO correctly rejects the inconsistent proposals by just three of the 21 parties to this Docket that the Commission initiate a follow-on Docket, on the heels of the instant Docket, to develop *pro forma* delivery services tariffs. (HEPO, p. 9). Indeed, as ComEd pointed out in its Brief on Exceptions, the HEPO, while rejecting such proposals, should have made even more negative findings regarding the proposals. (ComEd Br. Exc., pp. 26-37).

While MidAmerican continues to propose such a Docket (Brief on Exceptions of [MidAmerican] ["MidAmerican Br. Exc."], pp. 2-5), MidAmerican's proposal remains unlawful, unwarranted, unwise, and ill-timed. NewEnergy and the IIEC now are offering a new variation on their prior support for MidAmerican's proposal (Brief on Exceptions of [NewEnergy and the IIEC] ["NewEnergy/IIEC Br. Exc."], pp. 2-5), but NewEnergy's and the IIEC's new proposal likewise is illegal, unjustified, imprudent, and ill-timed.

MidAmerican, NewEnergy, and the IIEC offer little more than desultory and largely unsupported assertions in support of their proposals. The Commission should recognize that in not one of their briefs has any of those parties made any meaningful effort to address the legal arguments and the overwhelming evidence in the record adduced by ComEd and other parties that conducting a follow-on Docket, on the heels of this Docket, to establish *pro forma* tariffs would be improper, unjustified, and counter-productive. The Commission's obligation here is plain. The Commission, especially in rate matters, cannot base its decisions on unsupported pleas that are flatly debunked by the evidence in the record.

ComEd pointed out in the Introduction to this Reply the incontrovertible falsity of the pretense that ComEd and the other utilities have not worked towards greater uniformity in relation to delivery services where uniformity makes sense. The Commission should not be misled by attempts to portray ComEd and the other utilities as obstacles to uniformity where it is appropriate and its benefits outweigh its costs.

For example, MidAmerican's professed skepticism about the value of further workshops (MidAmerican Br. Exc., p. 2) and about the intentions of the other utilities (*id.* at pp. 3-4), and NewEnergy and the IIEC's similar remarks (NewEnergy/IIEC Br. Exc., pp. 2-3), cannot possibly be squared with, among other things, what occurred in Commission Docket Nos. 98-0454, 98-0650, and 98-0680, the fact that the utilities agreed to the Stipulation approved by the Commission's Interim Order in this Docket, and the further proposals made and agreed to by ComEd in the litigation phase of this Docket. Also, it should be noted that, contrary to what MidAmerican appears to imply (MidAmerican Br. Exc., p. 3), MidAmerican did not even propose its *pro forma* tariffs until after the workshops in this Docket, when it sprang them in its direct testimony. (ComEd Init. Br., pp. 28, 30; ComEd Rep. Br., pp. 17-18).

ComEd also pointed out in the Introduction to this Reply that MidAmerican, NewEnergy, and the IIEC have not even attempted to, and cannot, make an actual case for instituting a follow-on Docket to develop *pro forma* tariffs. The evidence in the record is overwhelming that such a Docket would be a monumental and burdensome undertaking. Not only that, but there is no evidence whatsoever that any lack of greater uniformity had led any prospective RES to stay out of the Illinois market or out of any service territory, has caused even one customer to fail to switch to delivery services, or has caused any RES or customer to incur even one dollar of additional costs. Indeed, it is remarkable that MidAmerican, even now, essentially presents

nothing that amounts to a valid substantive argument for the adoption of *pro forma* tariffs, and instead dwells on its implausible stated pessimism about further workshops and about the other utilities' attitudes. (MidAmerican Br. Exc., pp. 2-5).

The evidence in the record actually shows, moreover, that, even setting aside their impropriety, leaping to *pro forma* tariffs at this stage of the development of the market makes no sense and would discourage innovation. MidAmerican, NewEnergy, and the IIEC are asking the Commission to adhere to a theory and to ignore the law and the evidence in the record. That is wrong. The Commission should reject their exceptions.

A. MidAmerican's Proposal For A Follow-On Docket To Develop *Pro Forma* Tariffs Remains Unlawful, Unwarranted, Unwise, And Ill-Timed

As noted above, MidAmerican, undaunted by the law and the evidence in the record, adheres to its view that the Commission should initiate a follow-on Docket, on the heels of the instant Docket, to develop *pro forma* tariffs. (MidAmerican Br. Exc., pp. 2-6). MidAmerican's position is improper and utterly without merit.

MidAmerican's proposal is illegal, for several reasons. Based on the lack of notice that any such issues would be considered in this Docket, and the resulting lack of any meaningful opportunity for ComEd and the other utilities to be heard as to these issues, any Commission Order concluding that uniform or *pro forma* tariffs should be adopted, or that a follow-on Docket should be initiated for that purpose, would violate due process. U.S. Const., amend. XIV; Ill. Const., art. I, § 2; *Quantum Pipeline Co. v. Illinois Commerce Comm'n*, 304 Ill. App. 3d 310, 320, 709 N.E.2d 950, 956 (3d Dist.) (Commission violated due process by providing inadequate notice) (citations omitted), *appeal denied*, 185 Ill. 2d 665, 720 N.E.2d 1105 (1999). (Initial Brief of [ComEd] ["ComEd Init. Br."], pp. 14-16; Reply Brief of [ComEd] ["ComEd Rep. Br."],

pp. 17-20).

MidAmerican's proposal also would violate the utilities' due process and other procedural rights in another respect. It would compress the follow-on Docket into so short a period -- six months (MidAmerican Br. Exc., p. 5) -- that it necessarily would deny the utilities meaningful discovery and a meaningful opportunity to be heard. (ComEd Init. Br., pp. 17-18; ComEd Rep. Br., pp. 18-19).

MidAmerican's proposal that uniform tariffs be established prior to, and outside of, a rate case would also violate the utilities' long-established right to propose their own tariffs, which the restructuring legislation confirmed and codified with regard to delivery services tariffs, in particular. *Lowden v. Illinois Commerce Commission*, 376 Ill. 225, 231, 33 N.E.2d 430, 434 (1941); 220 ILCS 5/16-108. (ComEd Init. Br., pp. 16-17; ComEd Rep. Br., p. 18).

MidAmerican's proposal also would create a new and unlawful burden on utilities in all future delivery services tariffs proceedings, i.e., that they show not only that their proposed tariffs are just and reasonable, which is all that the law actually requires, 220 ILCS 5/9-201(c), 16-108, but also that they prove that they are superior to the *pro forma* tariff language. (ComEd Init. Br., p. 18; ComEd Rep. Br., p. 22).

Finally, MidAmerican's proposal also is unlawful because it seeks to relieve MidAmerican of the burden of showing that its proposed *pro forma* tariffs are just and reasonable, something which MidAmerican does not claim to have, and in fact admits that it has not, shown. (ComEd Init. Br., p. 19; ComEd Rep. Br., p. 23).

The stark reality that MidAmerican's proposal simply is illegal is compounded by the harsh but indisputable facts that MidAmerican's proposal is unwarranted, unwise, and ill-timed. MidAmerican's proposal, like any other, should be assessed not only in terms of its legality (or

illegality here) but also in terms of its likely benefits, burdens, costs, and risks. (ComEd Init. Br., pp. 19-20; ComEd Rep. Br., p. 23). The evidence in the record proves, among other things, that:

- ComEd's delivery services tariffs are understandable in their current form. (ComEd Init. Br., pp. 20-21).
- RESs and customers alike have a variety of sources of information in clarifying any provision of the utilities' delivery services tariffs. (ComEd Init. Br., pp. 21-22).
- ComEd's delivery services tariffs are appropriately structured, and facilitate comparisons between bundled and delivery services tariffs. (ComEd Init. Br., p. 21). While the IIEC sought to minimize the importance of those facts versus the alleged value of comparability among different utilities' delivery services tariffs, the IIEC was unable to identify any ComEd customer that operates in multiple service territories. (*Id.* at pp. 22-23).
- Uniform tariffs simply will not enhance competition in any meaningful way. (ComEd Init. Br., pp. 23-25). Proponents of *pro forma* delivery services tariffs agree that there are a number of factors that significantly affect competition in a given service territory -- all of which are entirely unrelated to uniformity of tariffs. (Schlaf Tr. 70-74; Stephens Tr. 651-652; Rea Tr. 355-356; *see also* Juracek Sur., ComEd Ex. 6.0, p. 8). Significant factors that those parties identified as affecting competition include the following: (1) low rates in some service territories, making competition less attractive; (2) Federal Energy Regulatory Commission ("FERC") Open Access Transmission Tariff ("OATT") energy imbalance tariffs that are unsatisfactory or prohibitive to some RESs and customers; (3) special contracts with larger customers, thereby decreasing the pool of desirable potential customers; (4) transition charges; (5) the current volatility of the wholesale market; (6) the fact that a limited pool of customers currently exist in Illinois prior to the opening of the residential market; (7) the ability of a competitor to site and build independent generation; (8) customer density; and (9) load shape distribution. (*Id.*)
- *Pro forma* tariffs risk increased confusion and disputes over tariff language. (ComEd Init. Br., p. 26).
- *Pro forma* tariffs may unnecessarily cause the imposition of new or different business processes on utilities, resulting in increased burdens, costs, and risks for the utilities and customers, including business processes that have not been tested and that may prove to be unworkable. (ComEd Init. Br., p. 27).
- MidAmerican's proposed *pro forma* tariffs, in particular, are not appropriate because, among other things, they were not "workshopped" and instead were sprung on ComEd in MidAmerican's direct testimony, MidAmerican itself has

stated that it would seek to deviate from its own proposed *pro forma* tariffs, they have not been (and could not be) shown to be just and reasonable, they are completely untested, and, not surprisingly, they contain a multitude -- hundreds -- of flaws. (ComEd Init. Br., pp. 27-30).

- MidAmerican vacillated on several important details of its proposal. (ComEd Init. Br., pp. 30-31).
- MidAmerican's proposal is premature given the state of development of the market, and is ill-timed given that the utilities are devoting their efforts to the preparation (or, in the case of Ameren, the prosecution) of their residential delivery services rate cases. (ComEd Init. Br., pp. 31-33).
- If any tariffs were to be used as *pro forma* tariffs, then it should be ComEd's existing and proven delivery services tariffs, not MidAmerican's untested and unproven *pro forma* tariffs, that should be used. (ComEd Init. Br., pp. 33-34). ComEd's service territory has experienced the most open access activity and is the service territory in which the most delivery services customers and RESs already operate. (*Id.*) In addition, State-wide, almost all of the customers that have switched to RESs that are unaffiliated with any utility are located in ComEd's service territory. (*Id.*) Given the significantly higher degree of switching that exists within ComEd's service territory as compared with other service territories within Illinois, and the fact that a greater number of RESs would be familiar with ComEd's customer and supplier delivery services tariffs, ComEd's current customer and supplier delivery services tariffs should be the starting point for any discussion of *pro forma* customer and supplier delivery services tariffs. (*Id.*)

Given the law and the evidence in the record, the Commission must reject MidAmerican's proposal.

**B. NewEnergy's And The IIEC's New Proposal For
A Follow-On Docket To Develop *Pro Forma* Tariffs
Is Unlawful, Unwarranted, Unwise, And Ill-Timed**

NewEnergy and the IIEC now are offering a new variation on their prior support for MidAmerican's proposal. NewEnergy and the IIEC now propose that Staff should revise MidAmerican's proposed *pro forma* tariffs in the next two months, that the Staff-revised MidAmerican proposed *pro forma* tariffs should then be "workshopped" for six months (overlapping the utilities' residential delivery services rate cases), culminating in an evidentiary

proceeding in 2002 in which the utilities would bear the burden of proving that there should be any changes to the Staff-revised MidAmerican proposed *pro forma* tariffs. (NewEnergy/IIEC Br. Exc., pp. 2-5). Needless to say, as with MidAmerican's proposal, NewEnergy and the IIEC's variation on MidAmerican's proposal is illegal, unjustified, imprudent, and ill-timed.

The short answer is that NewEnergy and the IIEC's new proposal contains every flaw of MidAmerican's proposal but one. NewEnergy's and the IIEC's proposal is not compressed into a six month period but rather would take 17 months (thereby indirectly illustrating the unreasonableness of MidAmerican's proposed timing).

However, NewEnergy's and the IIEC's proposal adds the problem that the Commission would be giving Staff just two months, without input from any other party, in which to revise MidAmerican's proposed *pro forma* tariffs. (NewEnergy/IIEC Br. Exc., pp. 3, 4-5). There is no indication as yet that Staff is ready, willing, and able to perform that function in the time allotted. Moreover, and perhaps even more importantly, NewEnergy and the IIEC would have the Commission direct Staff to modify MidAmerican's proposed *pro forma* tariffs based on the evidence in the record (*id.*) even though ComEd and the other parties were not afforded a meaningful opportunity to analyze MidAmerican's proposed *pro forma* tariffs and to present their comments and criticisms. (ComEd Init. Br., pp. 15-16, 29-30; ComEd Rep. Br., pp. 18, 30-32) ComEd presented only a hurried and incomplete analysis of MidAmerican's proposed *pro forma* tariffs, albeit even that truncated analysis showed hundreds of uncontroverted flaws. (*Id.*) No other party was able to present any analysis at all. Also, as described earlier, the evidence also proved that, if any tariffs should be used as, or as starting points for the development of, *pro forma* tariffs, it should be ComEd's approved tariffs. The Commission should reject NewEnergy's and the IIEC's exceptions.